

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
November 28, 2006 Session

CHARLES WADE SMITH, III v. STATE OF TENNESSEE

Appeal from the Circuit Court for Perry County
No. 822-3-174 Jeff Bivins, Judge

No. M2006-00897-CCA-R3-PC - Filed February 16, 2007

Petitioner, Charles Wade Smith, III, was convicted by a Perry County jury of second degree murder and received a sentence of seventeen years as a violent offender. His conviction was affirmed on appeal. State v. Charles Wade Smith, III, No. M2001-01740-CCA-R3-CD, 2003 WL 22116629 (Tenn. Crim. App. Sept. 11, 2003). On September 9, 2004, the petitioner, through counsel, filed a petition for post-conviction relief alleging ineffective assistance of counsel related to the petitioner's alleged impairment due to drugs or alcohol during the trial. After an evidentiary hearing, the trial court found that the petitioner had failed to prove any allegations by clear and convincing proof and denied the petition. Upon full consideration of the record, we agree and affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which DAVID G. HAYES and NORMA MCGEE OGLE, JJ., joined.

Lloyd R. Tatum, for the appellant, Charles Wade Smith, III

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel E. Willis, Assistant Attorney General; Ronald L. Davis, District Attorney General; Jeffrey L. Long, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The petitioner, Charles Wade Smith, III, appeals the trial court's denial of his petition for post-conviction relief. His conviction for second degree murder arises from the shooting death of his father. The underlying facts, taken from the petitioner's direct appeal opinion, that are relevant to the post-conviction petition follow.

On May 19, 1998, the petitioner telephoned the Perry County Sheriff's Department and reported to the dispatcher that "I've just shot my dad. He was trying to kill me with a nine millimeter, and I shot him with a shotgun." When officers arrived at the scene, they found the victim dead as a result of an apparent shotgun wound. The officers testified that there was a pistol in the victim's hand, but it appeared to have been placed there after the shooting. They stated that they found no evidence that the pistol had been fired and that an examination of the pistol showed that it was not ready to shoot.

The petitioner made various statements to the investigating officers regarding his altercation with the victim. Initially, he claimed that the victim threatened to kill him and fired the pistol at him, that he shot the victim, and that the handgun never fell out of the victim's hand. When confronted by aspects of his statement that the investigators found implausible, the petitioner changed his statement and admitted that he had moved the pistol to the victim's hand because it had fallen from his hand when he was shot. Toxicology reports revealed that both the petitioner and the victim were intoxicated at the time of the offense.

At trial, the petitioner presented a theory of self-defense. He testified that he and the victim had a pretty good relationship as long as the victim was not drinking. The petitioner related earlier incidents when the victim had beat him. He stated that, on the day of the offense, both he and the victim had been drinking and that the victim threatened to kill him after the petitioner asked to borrow a lighter to light the grill. He claimed that he attempted to leave in his truck, but he could not find his keys. He testified that he shot the victim when the victim raised the pistol toward him. He felt it was reasonable to defend himself under those circumstances but said that he did not intend to kill the victim.

Other individuals testified regarding the victim's propensity for violence, particularly when intoxicated and in possession of guns. The jury rejected the self-defense theory and convicted the petitioner of second degree murder as charged in the indictment. The petitioner filed a motion for new trial that raised various errors warranting a new trial, including the petitioner's alleged impairment due to drugs and alcohol during the trial. The trial court denied the motion and a subsequent direct appeal affirmed the judgment of the trial court. The petitioner filed his post-conviction petition alleging that he was denied his constitutional right to the effective assistance of counsel because of counsel's failure to recognize his alleged impairment during the trial and handle the situation appropriately.

At the post-conviction hearing, the petitioner's trial attorney testified that he filed an affidavit as part of the petitioner's motion for new trial relating to the petitioner being under the influence of alcohol or drugs during the trial and, more particularly, when he testified in his own defense. He stated that he was concerned about the petitioner's demeanor before the jury which he described as unemotional and lethargic and opined that the petitioner's demeanor before the jury suffered when he appeared for court inappropriately dressed and unshaven. Although he never smelled alcohol on the defendant, he recalled that he had such a genuine concern over the petitioner's demeanor that he asked if the petitioner was under the influence of anything; but neither the petitioner nor his mother

reported that the petitioner was under the influence of anything while the trial was proceeding. He testified that he had the petitioner evaluated in preparation for the motion for new trial and learned that the petitioner was taking drugs and alcohol throughout the trial. He indicated that had he known that the petitioner was misusing alcohol and drugs during the trial he would have handles things differently and possibly sought a continuance because the petitioner's credibility before the jury was critical to the theory of self-defense.¹

On cross-examination, the trial attorney admitted that the petitioner had given authorities inconsistent statements throughout the investigation of the homicide and that the petitioner appeared frustrated when cross-examined regarding the inconsistencies. He stated that he was never really sure what was wrong with the petitioner during the trial, but that overall he felt that "we put on an effective defense."

The petitioner's mother, Pat McCommon, testified that the petitioner did not handle the trial well emotionally. She recalled that she had difficulty waking him each day of the trial and that he just seemed very "groggy." She stated that he told her that he had taken extra pills for depression and anxiety one of the days. She recounted that she told the trial attorney that "[s]omething's just not right. He's taken some medication, he's not right." She said that the trial attorney told her that he wanted the petitioner in a better frame of mind the next day. She testified that she never suspected that he was under the influence of alcohol, although he had consumed a few drinks the night before at dinner. On cross-examination, McCommon stated that the petitioner had taken only his prescribed medications and acknowledged that some of them could make a person groggy or sluggish. She admitted that she never described the petitioner as "overmedicated" in her affidavit. She also admitted that the petitioner looked "kind of rumpled" but was still properly dressed each day for court. Lastly, she conceded that everything the petitioner had done regarding medication or consuming alcohol was his choice and against the advice and warning of his trial attorney.

ANALYSIS

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. Tenn. Code Ann. §40-30-110(f). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance

¹ We note that the allegations in the petition relate to additional areas of alleged ineffective representation. However, at the evidentiary hearing, counsel limited his proof and argument to the issue of petitioner's alleged intoxication during trial.

was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984); see Lockart v. Fretwell, 506 U.S. 364, 368-372, 113 S.Ct. 838, 842-44 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S.Ct. 2068. The Strickland standard has been applied to the right to counsel under Article I, Section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner will only prevail on a claim of ineffective assistance of counsel after satisfying both prongs of the Strickland test. See Henley v. State, 960 S.W.2d 572, 580 (Tenn. 1997). The performance prong requires a petitioner raising a claim of ineffectiveness to show that the counsel's representation fell below an objective standard of reasonableness or "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066. In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. The prejudice prong requires a petitioner to demonstrate that "there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. "A reasonable probability means a probability sufficient to undermine confidence in the outcome." Id. Failure to satisfy either prong results in the denial of relief. Id. at 697, 104 S.Ct. At 2069.

The post-conviction court found that the petitioner had failed to prove his allegation of ineffective assistance of counsel by clear and convincing proof. Specifically, it found that trial counsel was an experienced attorney who inquired appropriately regarding his concerns about the petitioner's demeanor and received no report from either the petitioner or his mother that the petitioner was impaired during the trial. The post-conviction court found McCommon's testimony "not to be credible." In summary, the court found that trial counsel's performance was not deficient and that no prejudice had been shown.

Our review leads this court to the same conclusion. Counsel made repeated attempts to inquire into the petitioner's ability to proceed with the trial, and he issued advice and warnings regarding the petitioner's demeanor before the jury. Based upon the responses to these inquiries and warnings, counsel had no reason to believe that the petitioner was misusing his prescription medication as has now been reported post-trial by both the petitioner and his mother. Counsel stated at the evidentiary hearing that had he known anything regarding the petitioner's impairment, he would have told the trial court and possibly asked for a continuance. This court has repeatedly held that, on claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight. Adkins v. State, 911 S.W.2d 334, 347 (Tenn. Crim. App.1994).

Furthermore, there was no testimony at the evidentiary hearing regarding how a continuance might have made a difference in the outcome of the petitioner's trial. Also, we note that the

petitioner did not testify at the evidentiary hearing regarding his condition at trial. This court finds that the evidence is lacking relative to a showing that there exists a reasonable probability that the outcome of the petitioner's trial would have been different, irrespective of his appearance and demeanor before the jury throughout the trial. The petitioner gave several inconsistent statements to investigators and the forensic evidence did not support a theory of self-defense. The trial court was correct in concluding the petitioner failed to prove by clear and convincing evidence that counsel's performance fell below an objective standard of reasonableness or that any prejudice would result by the alleged deficient performance.

CONCLUSION

Upon full consideration of the record and arguments of counsel, the judgment of the trial court is affirmed.

D. KELLY THOMAS, JR., JUDGE